

IN THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

FILED
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RICHARD B. RICHARDS, CLERK
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STATE OF TENNESSEE, *ex rel.*)
ROBERT E. COOPER, JR.,)
Attorney General and Reporter,)
)
Petitioner,)
)
v.)
)
PETER THOMAS ROTH, LLC,)
a New York limited liability corporation,)
and all officers, directors, owners,)
employees, members, affiliates,)
successors, subsidiaries, agents and)
representatives of PETER THOMAS)
ROTH, LLC,)
)
Respondent.)

No. _____

ASSURANCE OF VOLUNTARY COMPLIANCE

1. The State of Tennessee, by and through Robert E. Cooper, Jr., the Attorney General and Reporter, at the request of Gary Cordell, the Director of the Division of Consumer Affairs of the Department of Commerce and Insurance, accepts this Assurance of Voluntary Compliance as defined below, given by Peter Thomas Roth, LLC, a New York limited liability corporation (hereinafter "Respondent"), subject to the approval of this Court.

WITNESSETH:

2. Some of the facts and circumstances surrounding the execution of this Assurance are as follows:

- A. The Division and the Attorney General conducted an investigation of Respondent's marketing and advertising of three products: "Lashes to Die For", "Brows to Die For" and "Lashes to Die For Platinum", (hereinafter "the products at issue"). As a result of that investigation, the Division and the Attorney General allege that certain acts and practices of Respondent in the sale of the products at issue in this state have violated the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.* ("the Act").
- B. Respondent denies violating the Act. Further, pursuant to Tenn. Code Ann. § 47-18-107(c), acceptance of this Assurance by Respondent shall not be considered an admission of a violation of the Act except as set forth in § 47-18-109.
- C. Therefore, pursuant to Tenn. Code Ann. § 47-18-107, Respondent gives this Assurance, and the Attorney General accepts this Assurance, in order to avoid the expense associated with litigation.

3. Pursuant to Tenn. Code Ann. § 47-18-107, subject to Court approval, Respondent gives and the Division and the Attorney General accept the following assurances.

DEFINITIONS

4. As used in this Assurance and accompanying Order, the following words have the following meanings:

- A. "**Advertise**," "**Advertisement**," or "**Advertising**," means any written, oral, graphic, or electronic statement, illustration, or depiction that is designed to create interest in the purchasing of, impart information about the attributes of, publicize the availability of, or affect the sale or use of, goods or services, whether the statement appears in a brochure, newspaper, magazine, free-standing insert, marketing kit, leaflet, mailer, book insert, letter, catalogue, poster, chart, billboard, electronic mail, website or other digital form, slide, radio, broadcast television, cable television, or commercial or infomercial whether live or recorded.

- B. “**And**” and “**or**” shall be construed conjunctively or disjunctively as necessary, and to make the applicable phrase or sentence inclusive rather than exclusive.
- C. “**Assurance**” shall mean and refer to this document entitled Assurance of Voluntary Compliance in the matter of *State of Tennessee ex rel. Robert E. Cooper, Jr., Attorney General and Reporter, v. Peter Thomas Roth, LLC, a New York limited liability corporation, and all officers, directors, owners, employees, affiliates, successors, subsidiaries, agents and representatives of Peter Thomas Roth, LLC.*
- D. “**Attorney General**” means the Office of the Tennessee Attorney General and Reporter.
- E. “**Consumer**” means any person, a natural person, individual, governmental agency, partnership, corporation, trust, estate, incorporated or unincorporated association, and any other legal or commercial entity however organized.
- F. “**Consumer Act**” means the Tennessee Consumer Protection Act of 1977, as may be amended from time to time, and related statutes found at Tenn. Code Ann. § 47-18-101, *et seq.*
- G. “**Division**” means the Division of Consumer Affairs of the Tennessee Department of Commerce and Insurance.
- H. “**Department**” means the Tennessee Department of Commerce and Insurance.
- I. “**Document**” shall be synonymous in meaning and equal in scope to the usage of the term in Tenn. R. Civ. P. 34, and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained, extracted and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document.
- J. “**Drug**”, “**drug claim**”, “**drug product**” and “**hair growth product**” shall be defined and applied as set out in the federal Food Drug and Cosmetic Act, 21 U.S.C. §301 *et seq.*, and applicable federal regulations in 21 C.F.R. Chapter 310.
- K. “**FDA**” means the United States Food and Drug Administration.
- L. “**Including**” or “**include**” mean including, without limitation.
- M. “**Order**” shall mean and refer to the Agreed Final Order entered in *State of Tennessee ex rel. Robert E. Cooper, Jr. v. Peter Thomas Roth, LLC, a New York limited liability*

corporation, and all officers, directors, owners, employees, affiliates, successors, subsidiaries, agents and representatives of Peter Thomas Roth, LLC.

- N. **“Person”** means a natural person, individual, organization or other legal entity, including a corporation, partnership, proprietorship, association, trust, estate, cooperative, limited liability company, government or governmental subdivision or agency, any legal or commercial entity however organized, or any other group or combination acting as an entity.
- O. **“Petitioner”** and **“State”** means the Office of the Attorney General of the State of Tennessee.
- P. **“Respondent”** means Peter Thomas Roth, LLC, and/or any and all general partners, parent corporation(s), affiliates, subdivisions, future or past purchasers, merged parties, inheritors or other successors in interest, and all of their officers, directors, owners, employees, sales staff, managers, partners, parents, subsidiaries, affiliates, successors, assigns, agents and representatives acting on behalf of Peter Thomas Roth, LLC.

JURISDICTION

5. For the limited purpose of entering and enforcing this Assurance and Order, Respondent admits that this Court has jurisdiction over the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*, however Respondent does not concede that the Court has jurisdiction regarding Petitioner’s allegations or that those allegations constitute a violation of the Consumer Protection Act. Respondent acknowledges that under the Act, this Court retains jurisdiction to enable the parties to apply for further orders and directions as may be necessary or appropriate for the construction, modification, or execution of this Assurance and Order, including enforcement of compliance therewith and assessment of penalties for violation(s) thereof. The State reserves the right to seek payment by Respondent for court costs and reasonable attorneys’ fees, and any other costs associated with any successful petitions to enforce any provision of this Assurance and Order, against Respondent. Otherwise Respondent reserves all objections relating to

jurisdiction, and may raise all of its arguments including, without limitation, its assertion of pre-emption by the Federal Food, Drug and Cosmetic Act and related regulations, at a later date.

VENUE

6. Pursuant to Tenn. Code Ann. § 47-18-107, venue as to all matters between the parties relating hereto or arising out of this Assurance is solely in the Circuit Court of Davidson County, Tennessee.

PERMANENT INJUNCTION AND REHABILITATION

7. Accordingly, it is hereby agreed that upon approval of this Assurance by the Court, Respondent and anyone acting in concert with Respondent shall be permanently and forever enjoined, restrained and bound from directly and indirectly engaging in the practices set forth herein, and further, permanently required to satisfy directly or indirectly the affirmative requirements set forth herein:

A. Respondent shall not directly or indirectly advertise, market, promote, offer for sale, or sell any hair growth products from a location in the territory of the State or to Tennessee consumers from a location outside the territory of this State and shall take all reasonable steps to stop its distributors and retailers from selling its hair growth products in this State or to Tennessee consumers until:

(1) Respondent's hair growth products are approved as a drug or device by the FDA;

(2) The FDA determines that it will not exercise jurisdiction over Respondent's hair growth products as a drug or device; or

(3) A court of competent jurisdiction determines that the FDA is enjoined from detaining Respondent's hair growth products or determines that FDA lacks jurisdiction to take administrative action against Respondent's hair growth products

pursuant to its statutory authority over drugs and/or medical devices and the court's ruling is not stayed.

- B. Respondent shall be prohibited from engaging in any misleading, unfair, or deceptive acts or practices in the conduct of its business in Tennessee or with Tennessee consumers. Respondent shall fully comply with all provisions of the Consumer Act, including but not limited to §§ 47-18-104(a) and (b)(27), which prohibit unfair and deceptive acts and practices.
- C. Respondent shall not directly or indirectly represent, state, promote, claim, advertise, or imply to any Tennessee consumer or from Tennessee that goods or services have sponsorship, approval, characteristics, ingredients, uses or benefits that they do not have, in violation of Tenn. Code Ann. § 47-18-104(b)(5).
- D. Respondent shall not directly or indirectly represent, state, promote, claim, advertise, or imply to any Tennessee consumer or from Tennessee that its goods or services are of a particular standard, quality, or grade if such is not the case, in violation of Tenn. Code Ann. § 47-18-104(b)(7).
- E. Respondent shall not represent, state, promote, claim, advertise, or imply that Respondent will provide goods or services to Tennessee consumers or from Tennessee which Respondent is prohibited by law from providing to Tennessee consumers, or from Tennessee.
- F. Respondent shall be prohibited from stating, implying or causing to be stated or implied that the Attorney General, the Division, the Department, or any other governmental unit of the State approved, sanctioned, or authorized any practice, act, or conduct of the Respondent.
- G. Respondent shall be prohibited from representing or implying that any procedure or other acts or practices hereafter used or engaged in by Respondent have been approved, in whole or in part, by the State.

MONETARY PAYMENT TO THE STATE OF TENNESSEE

8. Within three days of entry of this Assurance, Respondent shall pay the sum of One Thousand Five Hundred and 00/100 Dollars (\$1,500.00) to the State of Tennessee, which shall be used as follows:

- A. **Payment to the General Fund.** Respondent shall pay the sum of Six Hundred

and 00/100 Dollars (\$600.00) to the State of Tennessee's General Fund.

B. **Attorneys' Fees and Costs.** Pursuant to Tenn. Code Ann. § 47-18-108(a)(4) and 47-18-108(a)(5), Respondent shall pay the sum of Nine Hundred and 00/100 Dollars (\$900.00) to the Tennessee Attorney General's Office for reasonable and appropriate attorneys' fees and costs of investigation, prosecution and monitoring of this matter, which may be used for consumer protection purposes or other lawful purposes at the sole discretion of the Tennessee Attorney General.

9. Said payment shall be made by certified or cashier's check made payable to the "Treasurer- State of Tennessee- Attorney General", delivered to the Attorney General within three (3) business days of execution of this Assurance. If the entire monetary amount anticipated by the State of Tennessee is not received, any monies received shall first be applied to attorneys' fees, and any additional monies shall be paid to the State of Tennessee General Fund.

MONITORING AND COMPLIANCE WITH THIS ASSURANCE

10. Upon a good faith belief of the Attorney General that a violation of this Assurance has occurred, Respondent agrees to provide books, records, and documents to the State at any time, and further, to informally or formally under oath, provide testimony and other information to the State relating to compliance with this Assurance. Respondent shall make any requested information in its possession available within three (3) weeks of the request at the Office of the Attorney General in Nashville, Tennessee or at any other location within the State that is mutually agreeable in writing to the Respondent and the Attorney General. This section shall in no way limit the State's right to obtain documents, information, or testimony pursuant to any federal or state law, regulation, or rule.

11. Respondent acknowledges that the State has the right to conduct undercover

investigations of Respondent to confirm compliance with this Assurance and state law, however Respondent contests the State's right to conduct any investigations to confirm compliance with the applicable provisions of the Food, Drug and Cosmetic Act and/or related federal regulations.

If undercover investigations are appropriate under applicable law, Respondent acknowledges that the State's undercover operatives, if any, are not required to disclose that they are representatives of the State when making contact with Respondent. Further, the State may record (audio and/or video) any or all aspects of its interaction with Respondent without notice to Respondent, but only if the State complies with applicable law. Respondent agrees to void any sale that is conducted by an undercover operative on behalf of the State, upon notification by the State.

PRIVATE RIGHT OF ACTION AND ACTIONS RESERVED BY THE STATE

12. Nothing in this Assurance shall be construed to affect, limit or alter any private right of action that any consumer, person, or any local, state, federal or other governmental entity, may hold against the Respondent.

PENALTIES FOR FAILURE TO COMPLY

13. Pursuant to Tenn. Code Ann. § 47-18-107(c), Respondent understands that upon execution and filing of this Assurance, any subsequent failure to comply with the terms hereof is *prima facie* evidence of a violation of the Act.

14. Pursuant to Tenn. Code Ann. § 47-18-107(f), Respondent understands that any knowing violation of the terms of this Assurance shall be punishable by civil penalties of not more

than One Thousand Dollars (\$1,000.00) for each violation, in addition to any other appropriate penalties, remedies and sanctions, including but not limited to, contempt sanctions and the imposition of attorneys' fees and civil penalties.

GENERAL PROVISIONS

15. The acceptance of this Assurance by the State shall not be deemed approval by the State of any of Respondent's advertising or business practices. Further, neither Respondent nor anyone acting on its behalf shall state or imply or cause to be stated or implied that the State, the Attorney General, the Department, the Division or any other governmental unit of the State has approved, sanctioned or authorized any practice, act, advertisement or conduct of Respondent.

16. This Assurance may only be enforced by the Court and parties hereto.

17. The titles and headers to each section of this Assurance are for convenience only and are not intended by the parties to lend meaning to the actual provisions of the Assurance.

18. As used herein, the plural shall refer to the singular and the singular shall refer to the plural and the masculine and the feminine and the neuter shall refer to the other, as the context requires.

19. Nothing in this Assurance shall limit the Attorney General's right to obtain information, documents or testimony from Respondent pursuant to any state or federal law, regulation or rule.

20. Nothing in this Assurance shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of this State. In addition, this Assurance

and Order shall not bar the State, or any other governmental entity from enforcing laws, regulations or rules against Respondent.

21. By agreeing to this Assurance, Respondent reaffirms and attests to the truthfulness, accuracy, and completeness of all of the information provided by Respondent to the State prior to entry of this Assurance. The State's agreement to this Assurance is expressly premised upon the truthfulness, accuracy, and completeness of the information provided by Respondent to the State throughout the course of the investigation of this matter, which information was relied upon by the State in negotiating and agreeing to the terms and conditions of this Assurance, particularly Respondent's representation that its Tennessee sales of the products at issue in the State's inquiry have been de minimis.

22. If the State finds that Respondent failed to disclose material information, or has made any other material misrepresentation or omission relevant to the resolution of the State's investigation, the State retains the right to seek modification of this Assurance or to have this Assurance set aside upon proper written notice to Respondent.

23. Nothing in this Assurance constitutes an agreement by the State concerning the characterization of the amounts paid hereunder for purposes of any proceeding under the Internal Revenue Code or any state tax laws.

24. Respondent waives and will not assert any defenses Respondent may have to any criminal prosecution or administrative action relating to the conduct described in the State's Petition, which defenses may be based, in whole or in part, on the Double Jeopardy or Excessive Fines Clauses of the Constitution or principles set forth in *Hudson v. United States*, 118 S. Ct. 488 (1997), and *Austin v. United States*, 509 U.S. 602 (1993), except as set out in paragraph 5 herein, and agrees

that the amount that Respondent has agreed to pay under the terms of this Assurance is not punitive in effect or nature for purposes of such criminal prosecution or administrative action.

25. Respondent hereby expressly waives and relinquishes any and all rights, remedies, appeals or other interests that it may possess to a jury trial or any derivative rights that flow from a trial by jury under the Tennessee Constitution or United States Constitution or any other law, regulation or rule.

26. No waiver, modification, or amendment of the terms of this Assurance shall be valid or binding unless made in writing, signed by the party to be charged, and approved by this Court, and then only to the extent set forth in such written waiver, modification or amendment.

27. Any failure by any party to this Assurance to insist upon the strict performance by any other party of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions of this Assurance, and such party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Assurance and the imposition of any applicable penalties, including but not limited to contempt, civil penalties and/or the payment of attorneys fees to the State.

28. If any clause, provision or section of this Assurance shall, for any reason, be held illegal, invalid or unenforceable, such illegality, invalidity or unenforceability shall not affect any other clause, provision or section of this Assurance and this Assurance shall be construed and enforced as if such illegal, invalid or unenforceable clause, section or other provision had not been contained herein.

29. Except as set out in paragraph five herein, Respondent waives any and all challenges in law or equity to the entry of the Assurance by the courts. Further, except as set out in paragraph

five herein, Respondent has waived any right to appeal, petition for *certiorari*, move to reargue or rehear or to otherwise be heard in connection with any judicial proceedings under this Assurance.

30. Time shall be of the essence with respect to each provision of this Assurance that requires action to be taken by the Respondent within a stated time period or upon a specified date.

31. This Assurance sets forth the entire agreement between the parties, and there are no representations, agreements, arrangements, or understandings, oral or written, between the parties relating to the subject matter of this Assurance which are not fully expressed herein or attached hereto.

32. Nothing in this Assurance shall be construed to waive any claims of Sovereign Immunity that the State may have in any action or proceeding.

33. Respondent will not participate, directly or indirectly, in any activity to form a separate entity or corporation for the purpose of engaging in acts prohibited in this Assurance or for any other purpose which would otherwise circumvent any part of this Assurance or the spirit or purposes of this Assurance.

34. Respondent agrees that this Assurance does not entitle Respondent to seek or to obtain attorneys' fees as a prevailing party under any statute, regulation or rule, and Respondent further waives any rights to attorneys' fees that may arise under such statute, regulation or rule.

35. Respondent further agrees to execute and deliver all authorizations, documents and instruments which are necessary to carry out the terms and conditions of this Assurance.

36. This document may be executed in any number of counterparts and by different signatories on separate counterparts, each of which shall constitute an original counterpart hereof and all of which together shall constitute one and the same document. One or more counterparts of this

Assurance may be delivered by facsimile or electronic transmission with the intent that it or they shall constitute an original counterpart thereof.

37. Respondent waives and relinquishes any arguments, rights or defenses regarding the fact that this document includes an injunction but no findings of fact or conclusions of law.

REPRESENTATIONS AND WARRANTIES

38. Respondent warrants and represents that "Peter Thomas Roth, LLC" is the true legal name of the entity entering into this Assurance and Order.

39. Respondent warrants and represents that it is the proper party to this Assurance and Order.

40. Respondent represents and warrants that the signatories to this Assurance have authority to act for and to bind the Respondent.

41. Respondent represents and warrants that the execution and delivery of this Assurance is a free and voluntary act, that this Assurance is the result of good faith negotiations, and that Respondent agrees that the Assurance and terms hereof are fair and reasonable.

42. Respondent represents and warrants that no offers, agreements, or inducements of any nature whatsoever have been made to the Respondent by the State, its attorney, or any employee of the Attorney General or the Division, to procure this Assurance.

43. Respondent represents and warrants that it no longer sells the products at issue in the State's inquiry in the United States, and that its Tennessee sales of the products at issue in the State's inquiry have been de minimis.

44. Respondent understands that the State expressly relies upon all of the representations

and warranties set forth in this Section of the Assurance and elsewhere within the Assurance and if any of them are false, misleading, deceptive, incomplete, unfair, or inaccurate in any way, the State shall have the right to move the Court to vacate or set aside (*inter alia*) this Assurance and Order (in whole or in part) and to move the Court find Respondent to be held in contempt or to seek statutory sanctions, if the State so elects.

COMPLIANCE WITH ALL LAWS, REGULATIONS, AND RULES

45. Nothing in this Assurance and Order shall be construed as relieving Respondent of the obligation to comply with all state or federal laws, regulations, or rules.

FILING OF ASSURANCE

46. Upon the execution of this Assurance, the Attorney General shall prepare and file in the Circuit Court for Davidson County a Petition, Order, and this Assurance for the Court's approval. Respondent hereby waives any and all rights which it may have to be heard in connection with judicial proceedings upon the Petition. All court costs will be paid out of the amounts outlined in paragraph eight. Simultaneously with the execution of this Assurance, Respondent shall execute an Order. This Assurance is made a part of and is incorporated into the Order. The Respondent consents to the entry of this Assurance and Order without further notice.

NOTIFICATION TO STATE

47. For three (3) years following execution of this Assurance, Respondent shall notify the Attorney General in writing at least ten (10) days prior to the effective date of any proposed changes in its corporate/business structure or any other business entity engaged in conduct that would be

covered by this Assurance, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or firm, the creation or dissolution or subsidiaries, or any other changes in status that may affect compliance with obligations arising out of this Assurance.

48. Any notices required by this Assurance shall be sent certified mail - return receipt requested, by United States Mail or by any other nationally recognized courier service that provides tracking services and identification of the person signing for the document. The documents shall be sent to the following addresses:

| For the Tennessee Attorney General: | For Respondent: |
|---|--|
| Deputy Attorney General Office of the Attorney General Consumer Advocate and Protection Division Post Office Box 20207 Nashville, Tennessee 37202 Telephone: (615) 741-1671 Facsimile: (615) 532-2910 | Ellyn Sternfield Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. 701 Pennsylvania Ave., NW, Suite 900 Washington, DC 20004 Telephone: (202) 434-7300 Facsimile: (202) 434-7400 |

The Respondent is required to provide the State with any changes to this information ten (10) days prior to any change becoming effective.


PAYMENT OF COURT COSTS

49. Court costs shall be paid as set forth in paragraph 46.

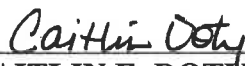
I hereby certify that this is a true copy
of original instrument filed in my office
this 13 day of Aug 2013
RICHARD R. ROOKER Clerk
By Amneal
Deputy Clerk

Jeff
JUDGE JOE R. SINICLEY, Jr.

FOR THE STATE OF TENNESSEE, ATTORNEY GENERAL:



ROBERT E. COOPER, JR.
Attorney General and Reporter
B.P.R. No. 10934



CAITLIN E. DOTY
Assistant Attorney General
B.P.R. No. 026273
Office of the Tennessee Attorney General
Consumer Advocate and Protection Division
Post Office Box 20207
Nashville, Tennessee 37202-0207
Phone: (615) 741-7663
Facsimile: (615) 532-2910

Referred by:



GARY CORDELL

Director

Division of Consumer Affairs of the
Department of Commerce and Insurance

500 James Robertson Parkway

5th Floor, Davy Crockett Tower

Nashville, TN 37243-0600

(615) 741-4737

FOR THE RESPONDENT:

A handwritten signature in black ink, appearing to read "Ellyn", followed by a large, stylized circular flourish. The signature is written over a horizontal line.

Ellyn Sternfield

D.C. Bar No. 1001552

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

701 Pennsylvania Ave., NW, Suite 900

Washington, DC 20004

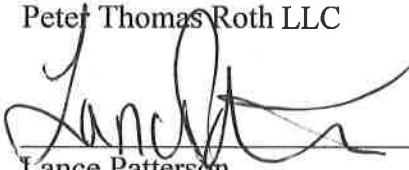
Telephone: (202) 434-7300

Facsimile: (202) 434-7400

RESPONDENT SIGNATURE AND ACKNOWLEDGMENT

Respondent and its attorney have read and understand this Assurance and each of its terms. Respondent admits to the jurisdiction of the Court for the limited purpose of entering this Assurance and Agreed Order. Respondent agrees to each and every term contained herein.

I, Lance Patterson, being first duly sworn on oath, depose and say that I am an officer of Peter Thomas Roth, Inc., and am fully authorized and empowered to sign this Assurance on behalf of Peter Thomas Roth, Inc., and bind the same to the terms hereof.

Peter Thomas Roth LLC
By: 
Lance Patterson
Co-President

SUBSCRIBED AND SWORN to before
me this 11 day of JULY, 2013.


Notary Public



My Commission Expires: 09-21-2016